

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 FORT PIERCE DIVISION  
4 CASE NO. 23-CR-80101-CANNON

5 UNITED STATES OF AMERICA,

6 Plaintiff,

October 12, 2023

7 vs.

Fort Pierce, Florida

8 DONALD J. TRUMP,  
9 WALTINE NAUTA,  
10 CARLOS DE OLIVEIRA,

11 Defendant s .  
12 \_\_\_\_\_/

13 GARCIA HEARING DEFENDANT NAUTA  
14 BEFORE THE HONORABLE AILEEN M. CANNON  
15 UNITED STATES DISTRICT JUDGE

16 **APPEARANCES :**

17 FOR THE GOVERNMENT :

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Pauline A. Stipes, Official Federal Reporter

1           *THE COURT:* Thank you, please be seated. All right.  
2 Welcome back, everybody. We will now proceed to conduct a  
3 Garcia Hearing with Mr. Nauta.

4           We have already had appearances, so we will not do  
5 that again. Importantly, all the preliminary remarks I made at  
6 the outset of the earlier hearing apply with equal force, in  
7 other words, no recording, no electronic equipment. This is an  
8 open hearing. As I indicated, unless and until there is a  
9 compelling reason based on attorney/client privilege to close a  
10 portion of it, at which point I will hear from the press  
11 coalition and the parties on that subject.

12           Let's proceed. I want to start off in this case with  
13 a clarification from Mr. Woodward. Having read all of the  
14 papers, I am not entirely clear, sir, whether you still  
15 represent any of the witnesses subject to this motion. I am  
16 referring to Trump Employee 4 as identified in the reports,  
17 Witness 1 and Witness 2.

18           *MR. WOODWARD, JR.:* Thank you, your Honor. I am happy  
19 to answer the Court's question and then I also wanted to flag a  
20 concern of ours regarding today's proceedings.

21           To answer the Court's question first, neither myself  
22 nor my law firm continue to represent Trump Employee 4. At  
23 this time we do, however, continue to represent Witness 1 and  
24 2.

25           *THE COURT:* What is your concern?

1           MR. WOODWARD, JR.: Your Honor, we take issue with the  
2 Special Counsel's Office, with their position with respect to  
3 what the scope of any waiver by Mr. Nauta would mean. In  
4 particular, I am referring to the three cases that the  
5 Government has come in and cited today for the first time,  
6 ostensibly arguing that we would be -- I or my law firm would  
7 be precluded from arguing in summation anything that would  
8 challenge the credibility of either a former client or even a  
9 current client.

10           We have taken a look at those three cases. We  
11 disagree that they stand for that proposition, but we are, of  
12 course, concerned that is the position they are taking today,  
13 and thus, obviously we think that they are likely to take that  
14 position in the future.

15           I would just flag two hypotheticals for the Court in  
16 that regard.

17           First, our concern with the position of the Special  
18 Counsel's Office is that it can't be, frankly, your Honor, it  
19 can't be the fact that we formerly represented Employee 4 would  
20 preclude us from questioning the credibility of Trump Employee  
21 4 as to any basis. Right?

22           So, consider hypothetically if Trump Employee 4 were  
23 to, God forbid, have a stroke between now and trial, nothing to  
24 do with our prior representation of him, the Government's  
25 position would be that we can't question his credibility or his

1 capability of truthfulness in summation based on that medical  
2 condition, which again has little or nothing to do with our  
3 prior representation of Trump Employee 4.

4 Taken to its core, in fact the case cited by the  
5 Special Counsel's Office, United States v Rahman, suggests it  
6 is not just summation, it is broader than summation. So, we in  
7 theory would be precluded from filing a motion to compel  
8 additional discovery based on our belief that there is  
9 information out there.

10 We, I think -- our position is going to be that that  
11 is not what the law requires, that is not what the Professional  
12 Rules of Responsibility require, but in fact, our continuing  
13 obligation to a former client is limited to confidences that we  
14 obtained through that representation, and that those -- we  
15 would be precluded from using those confidences in future  
16 proceedings, but we don't see how Mr. Nauta could make a  
17 knowing and voluntary waiver.

18 Obviously we have never discussed this possibility  
19 with Mr. Nauta because it is being raised for the first time  
20 today in these proceedings. So, we are concerned about Mr.  
21 Nauta making a knowing and voluntary waiver about,  
22 hypothetically, this Court ruling that I would be precluded  
23 from challenging the credibility of current and former clients  
24 who may take the stand, may or may not be cross-examined by me,  
25 and based on information that has nothing to do with

1 confidences that I may or may not have garnered through that  
2 representation.

3 So, respectfully, your Honor, we think that this issue  
4 needs to be resolved, or else the Special Counsel's Office can  
5 tell the Court that I am wrong about the way I am summarizing  
6 their position and they are not going to be asking at any time  
7 between now and trial to preclude me from arguing in summation  
8 that Trump Employee 4 is not credible.

9 *THE COURT:* I don't think they were indicating that  
10 they would move to preclude you from making that argument. I  
11 think their argument was that you, just by virtue of your prior  
12 representation, and what I have heard now is current  
13 representation, would independently be unable to vigorously  
14 challenge the credibility of those individuals just by virtue  
15 of your prior or current representation.

16 I think that is what they are saying, unless I  
17 misheard.

18 *MR. WOODWARD, JR.:* That is what I am saying also, is  
19 that their position would be that I, Stanley Woodward, could  
20 not challenge the credibility of Trump Employee 4 or Witness 1  
21 and 2 in summation in this trial, and that is -- our position  
22 is that that is not what the law provides, and we think -- if  
23 that is the Special Counsel's position, we think the Court  
24 needs to resolve that legal question before we can ask Mr.  
25 Nauta to make a knowing and voluntary waiver.

1           *THE COURT:* All right. Are you aware of any Eleventh  
2 Circuit authority to support that principle, assuming it is  
3 correctly represented in those cases?

4           *MR. WOODWARD, JR.:* No, your Honor. They cite three  
5 cases, 20 years senior, from a District Judge in the far away  
6 District of New York. So no.

7           Again, we don't think this is the law, but our concern  
8 is they have come before us today, they have made this  
9 representation for the first time, obviously they were prepared  
10 to make it, and we don't want to be in a position where we ask  
11 Mr. Nauta to waive his right to conflict-free counsel and then  
12 he comes to learn six months down the road that his lawyer of  
13 choice can't give summation at trial.

14           *THE COURT:* All right. Let me turn to the Government.

15           Thank you, Mr. Woodward.

16           Mr. Harbach, having looked at these cases, I am not  
17 quite sure they support the broad principle you indicated  
18 earlier. First question: Are you aware of any Eleventh  
19 Circuit authority to support these ideas?

20           *MR. HARBACH:* Insofar as we did not find an Eleventh  
21 Circuit case putting it quite as starkly as those opinions --

22           *THE COURT:* Or any case putting it less starkly?

23           *MR. HARBACH:* Our view is that this is not some arcane  
24 proposition that we teased out of thin air. There is a reason  
25 that a lawyer has twin duties to clients, a duty of

1 confidentiality, and a duty of loyalty.

2           *THE COURT:* I understand, but your point is that,  
3 setting aside any confidence and any breach of any confidences,  
4 that independently there is a free-standing limitation on an  
5 attorney -- on an attorney's ability to question the  
6 credibility of a former client in summation to the jury.

7           What I am wondering is if you have any Eleventh  
8 Circuit law supporting that notion, setting aside the  
9 cross-examination issue and setting aside the client  
10 confidences issue.

11           *MR. HARBACH:* As phrased, no, your Honor.

12           There are a few additional points I would like to  
13 make.

14           *THE COURT:* Factually, running through these cases,  
15 starting with Rahman, am I correct that in that case one of the  
16 attorneys asked to be relieved from further representation?

17           *MR. HARBACH:* We could go through a factual discussion  
18 of those cases, but I would caution that the reason that we are  
19 offering them for the Court's consideration is not because of a  
20 factual resemblance to our case; it is for what in our view is  
21 an unremarkable proposition.

22           *THE COURT:* Well, if it is so unremarkable, then it is  
23 striking to me that you wouldn't have made this apparently  
24 obvious point in your papers, and it is concerning that you are  
25 here raising these new cases, out of district obviously,

1 without any Eleventh Circuit authority on the subject, and then  
2 you are asking for a waiver discussion that is broader than  
3 envisioned in the paper seeking this hearing.

4 So this is coming to the Court in a new way,  
5 certainly, and there are some clear factual distinctions at  
6 least with respect to Rahman that I can see given how that  
7 transpired with the attorney's request to be relieved from  
8 representation.

9 I think in Spataro, I am not even sure that case  
10 concerned arguments to the jury, it seemed focused on  
11 cross-examination, which then leaves us with Yannotti, and  
12 there it is unclear to what extent the Court applied that legal  
13 principle to the facts presented.

14 Again, this goes back to the earlier point, of course,  
15 failure to raise these arguments makes it difficult for the  
16 Court and the parties on the fly to sort through these issues.

17 So, what do you propose?

18 MR. HARBACH: Well, I have a few suggestions. One is  
19 that the Court bear in mind that, unlike the situation with Mr.  
20 Irving, we need not dwell in theoretical land in order to  
21 resolve some of these things. We can talk very specifically  
22 about the reasons why Mr. Woodward should be prohibited from  
23 cross-examining his former client, and in the Government's  
24 view, if nothing else, even if the Court is not willing to  
25 accept the broad proposition that a duty of loyalty comprehends

1 both cross-examining a former client and impugning that  
2 client's credibility to the jury, even that --

3 *THE COURT:* One moment before you continue. I did not  
4 understand your papers to seek a prohibition on Mr. Woodward's  
5 ability to cross-examine. My understanding was this is  
6 ultimately something to be fleshed out and discussed at a  
7 Garcia Hearing with full openness.

8 If Mr. Nauta is comfortable proceeding with Mr.  
9 Woodward conducting cross-examination despite that baggage, so  
10 to speak, then it would be his choice to make and it wouldn't  
11 be a question of prohibiting Mr. Woodward from doing that.

12 *MR. HARBACH:* Well, I can hopefully clarify our  
13 position on that point now for at least a couple of reasons.

14 Number one is, these are two other ways in which this  
15 fact pattern is distinguishable from the one earlier today.

16 Number one, the Government will be calling Trump  
17 Employee 4 at trial. There is no question about that, and it  
18 should be unsurprising in light of the allegations that he  
19 supports in the superseding indictment. That's the first  
20 thing.

21 The second thing is that, unlike the other three  
22 witnesses from earlier this morning, this is one of the reasons  
23 I bothered to put it on the record, Trump Employee 4 has not  
24 waived his client confidences with Mr. Woodward in the way the  
25 other three clients have.

1           Those are two very important distinctions that should  
2 inform not only the Court's views of what Mr. Woodward should  
3 or should not do, but what his client, Mr. Nauta, should be  
4 advised of today.

5           So, the Government's position is that in light of the  
6 circumstances, and I can could elaborate on them if your Honor  
7 would like me to, that without question Mr. Woodward should be  
8 foreclosed from cross-examining Trump Employee 4 at trial.

9           *THE COURT:* So this is a different argument that was  
10 not made in the papers, this blatant request on a prohibition?

11           *MR. HARBACH:* No, because --

12           *THE COURT:* Where in the papers did you make this  
13 request?

14           *MR. HARBACH:* Our position is that Mr. Nauta should be  
15 so advised.

16           *THE COURT:* Okay. So advised of the risks associated  
17 with his attorney conducting cross-examination of a witness  
18 that he previously represented, but that is different from a  
19 Government request that I ban the attorney from conducting the  
20 cross-examination to begin with.

21           *MR. HARBACH:* I suppose that is true, and so as  
22 framed, perhaps the best way to advise Mr. Nauta, the most  
23 responsible way to advise Mr. Nauta, would be to tell him that  
24 there is a possibility that the Court could conclude that Mr.  
25 Woodward, A, cannot cross-examine Trump Employee 4, and to the

1 extent it is accurate, a possibility that the Court might  
2 preclude Mr. Woodward from arguing to the jury that Trump  
3 Employee 4 was not credible.

4 With the Court's indulgence, I want to mention one  
5 more thing that makes this an unusual situation and I will try  
6 and encapsulate it this way.

7 As the Court is aware, Trump Employee 4, while  
8 represented by Mr. Woodward, testified one way in the Grand  
9 Jury and then he later, after ceasing to be represented by Mr.  
10 Woodward, changed his testimony.

11 *THE COURT:* And there were a few things that happened  
12 also in between.

13 *MR. HARBACH:* That's right and I am happy to discuss  
14 that chronology if the Court pleases.

15 For present purposes, my point is that when Mr. --  
16 Trump Employee 4 takes the stand at trial, not only is it  
17 foreseeable, it seems inevitable that he should -- will be and  
18 probably should be cross-examined at length by Mr. Nauta's  
19 lawyer about his changed testimony, and there will be jury  
20 argument back and forth about what inferences the jury should  
21 draw from that and so forth.

22 I am not going to argue any of that today, except to  
23 point out that as concerns the Court's decision today about how  
24 to advise Mr. Nauta, another wrinkle is that, in the  
25 Government's view, it is foreseeable today that the fact of Mr.

1 Woodward's prior representation of Trump Employee 4 could well  
2 be before the jury in answer to questions that the witness may  
3 have occasion to make either on cross-examination or on  
4 redirect examination.

5 Can't predict for certainty whether that is going to  
6 happen, but it seems to us that that is a real possibility and  
7 it is something else that Mr. Nauta, fast forwarding to that  
8 eventuality, at trial might not be comfortable with. And so  
9 for those reasons, we suggest that the Court apprise Mr. Nauta  
10 of that possibility as well.

11 And that is just a -- that is a, in the Government's  
12 view, a foreseeable potential factual occurrence that is worth  
13 raising with Mr. Nauta today.

14 *THE COURT:* So you are talking about the fact of the  
15 prior representation might be elicited. Okay.

16 *MR. HARBACH:* In particular, it could come out that,  
17 yes, that Mr. Woodward previously represented Trump Employee 4.

18 *THE COURT:* The new flavor that you are spinning on  
19 this right now about a prohibition on Mr. Woodward making even  
20 any argument to the jury about the credibility of this former  
21 client, that is much broader than what was framed, and I think  
22 it does come out for the first time in your argument today  
23 without any supporting Eleventh Circuit case law, and it does  
24 impact the contours of the questioning.

25 Are there any other -- you obviously focus your

1 attention on Trump Employee 4. Do you have any similar  
2 arguments with respect to the two other individuals?

3 *MR. HARBACH:* Thank you, your Honor, for raising that.

4 With respect to Witness 2, it is no longer the  
5 Government's intention to call that witness at trial, so that  
6 witness is effectively off the table for today's discussion.  
7 That's Witness 2.

8 Then Witness 1, the only factual distinction that we  
9 think is of potential relevance to the Court today is that it  
10 is a current client, unlike the former client situation we had  
11 earlier today.

12 *THE COURT:* Okay. So, do you take the same position  
13 that Mr. Woodward would be prohibited from arguing to the jury  
14 that Witness 1 is not credible?

15 *MR. HARBACH:* Yes.

16 *THE COURT:* Again, you have no authority for that from  
17 the Eleventh Circuit or any other Court of Appeals.

18 *MR. HARBACH:* Not in the way that your Honor means,  
19 no.

20 *THE COURT:* I am simply trying to better understand  
21 the scope of your authority. You are introducing and injecting  
22 a much broader principle than previously raised, and I want to  
23 ensure that I have a complete understanding of the appellate  
24 case law if it exists on this subject, because it is broader  
25 than how you represented it previously. What I am hearing is

1 that you don't have any such additional authority.

2 MR. HARBACH: Yes, and the reason I said "as phrased"  
3 is because I understand what your Honor is asking. We don't  
4 have an Eleventh Circuit case that says what those New York  
5 cases say. However, again, our view is that it is really the  
6 same -- the origin is identical to the origin of the issues  
7 with --

8 THE COURT: But it is not identical. One concerns  
9 revealing confidential communications, and one is sort of this  
10 amorphous notion that because you previously represented  
11 somebody, or because you currently do, you would just feel  
12 intrinsically unable to attack that person's credibility, and  
13 that is very different.

14 MR. HARBACH: Our view is that the prohibition on --  
15 if I didn't, I meant to allude to this earlier this morning --  
16 or earlier this afternoon, that the prohibition on -- the  
17 ethical problems with cross-examining one's prior client flow  
18 from both duties potentially, the duty of confidentiality and  
19 the duty of loyalty. And I think your Honor hit on both of  
20 those when you were engaged in your colloquy with Mr. De  
21 Oliveira earlier this morning.

22 In other words, it is of course the case that a lawyer  
23 representing a former client may indeed have client confidences  
24 that, were it not for his ethical obligations to that former  
25 client, would enable him to vigorously cross-examine that

1 client for sure, but all tied up in that is the same duty of  
2 loyalty that we have been talking about. It is not just  
3 mechanical.

4 So, anyway, what I meant by the same origin a moment  
5 ago, acknowledging your Honor's point that there are two  
6 different branches of this tree, that the branch of the tree  
7 that concerns a lawyer's duty of loyalty is what I meant to say  
8 is the origin for both of these, the same ethical dilemma that  
9 your Honor described earlier that Mr. Irving might have.

10 *THE COURT:* There was no objection to that line of  
11 inquiry vis-a-vis Mr. De Oliveira and, of course, now there is.

12 *MR. HARBACH:* No, I am not objecting to that.

13 *THE COURT:* No, not from you. I am saying on the part  
14 of Mr. Irving or Mr. Murrell, and so there was really no  
15 difficulty on the part of the Defense with that line of inquiry  
16 in conducting the Garcia Hearing, but the circumstances  
17 vis-a-vis Mr. Nauta are not the same evidently given the  
18 objection raised by Mr. Woodward.

19 *MR. HARBACH:* Yes, and agree.

20 The circumstances are also vastly different, vastly  
21 different for the reasons I mentioned a moment ago.

22 For example, in the Government's view, it would be  
23 unnecessary and borderline silly to entertain the possibility  
24 that Mr. Woodward is not in possession of confidential client  
25 communications that might be valuable to him in cross-examining

1 Trump Employee 4.

2 It can't be that he -- that shouldn't even be up for  
3 discussion on these facts where Mr. Woodward represented him  
4 when he testified in the Grand Jury and he says X, and when Mr.  
5 Woodward no longer represents him he says Y. At a bear  
6 minimum, at a bear minimum he has to be privy to client  
7 confidences that would inform a cross-examination of that  
8 client at trial.

9 So, that is one way in which the situations are very  
10 different, very different.

11 So, that is why we think in this case it is crystal  
12 clear that Mr. Nauta should be advised and should be well aware  
13 of the possibility, likelihood, eventuality, however your Honor  
14 would like to put it, that his lawyer would not be able to  
15 cross-examine Trump Employee 4 at trial.

16 That much seems clear, and we don't, frankly,  
17 understand how Mr. Woodward could think that he could  
18 cross-examine Mr. -- Trump Employee 4 under these  
19 circumstances. We are at a loss.

20 *THE COURT:* All right. I will hear briefly from Mr.  
21 Woodward, and we are going to take a brief recess.

22 *MR. WOODWARD, JR.:* Your Honor, I don't know why they  
23 have any opinion about my representation of Trump Employee 4 at  
24 all. They haven't asked me, I don't know if they have asked  
25 him. We are filling the sky with hypotheticals insofar as --

1 maybe my answer is that I actually didn't talk to him before he  
2 went to the Grand Jury.

3 To presume that I am incapable of cross-examining him  
4 is a presumption that is unnecessary because, contrary to the  
5 Government's position, we don't know that he will testify in  
6 this trial. There is the potential that the Court could  
7 preclude him from testifying. There is the potential that he  
8 becomes unavailable.

9 *THE COURT:* Assuming he testifies, and we are hearing  
10 that he is going to be a witness, then that could very likely  
11 present a conflict and the exercise here is to determine  
12 whether Mr. Nauta is comfortable continuing to proceed with you  
13 as counsel should Mr. -- should Trump Employee 4 testify, and  
14 should you wish to cross-examine him, assuming the Court  
15 permits that.

16 I know there are some unpredictabilities here, but  
17 operating in this hypothetical universe, it is still  
18 my obligation to conduct a Garcia Hearing. The question is the  
19 scope of that hearing, so what are your thoughts on the  
20 particulars raised most recently by the Government, that simply  
21 permitting you to argue to the jury on the credibility of Trump  
22 Employee 4 would be prohibited?

23 *MR. WOODWARD, JR.:* Well, we are not prepared,  
24 candidly, to have that colloquy because the first time that  
25 that possibility has ever been raised was at this afternoon's

1 colloquy with Mr. De Oliveira.

2 We read the Court's order as requiring us to be  
3 present, we may have been wrong about that, but in an abundance  
4 of caution, we were here for your Honor. But what if we hadn't  
5 been here? Then the first time we would be hearing about it is  
6 when we came for the hearing that the Court had scheduled for  
7 3:00 o'clock.

8 I am not certainly prepared to advise Mr. Nauta if he  
9 is prepared to proceed with a trial in which he doesn't know  
10 what role his principal choice of counsel can play because,  
11 again, in the case law cited by the Government this isn't  
12 limited to summation. The Government used summation as an  
13 example, but would I also be precluded from filing a motion to  
14 strike Trump Employee 4's testimony because that potentially  
15 implicates his credibility, or my hypothetical duty of loyalty  
16 to a former client, which again we dispute that that duty  
17 actually exists.

18 So, I think we need from the Special Counsel's Office  
19 a clear understanding of what it is they are asking this Court  
20 to inquire of Mr. Nauta, and then we deserve the opportunity to  
21 brief whether those are realistic possibilities at all. And if  
22 they are, and the Court rules that they are, then we can ask  
23 Mr. Nauta if he is comfortable proceeding.

24 It seems intrinsically unfair to ask Mr. Nauta in this  
25 hypothetical world that we have created whether he is

1 comfortable proceeding when I certainly don't know, I don't  
2 think the Court knows, what role it is that I would be playing  
3 in the trial given the way the Special Counsel's Office has now  
4 framed my apparent obligations to a former client.

5 I do want to -- in an effort not to be completely  
6 argumentative, the Garcia precedent makes clear that we are  
7 here to talk about a hypothetical conflict that may arise. I  
8 am not objecting to that.

9 What I am objecting to is the way that the Special  
10 Counsel's Office has now framed -- even just the idea that they  
11 are going to seek an absolute bar, as the Court phrased it, on  
12 my cross-examining Trump Employee 4.

13 They may do that, but that is not the way that they  
14 phrased it in the papers. So, that is really putting us at a  
15 disadvantage in preparing for these proceedings and making sure  
16 that -- I am shocked that they would do it because this is all  
17 about ensuring that on appeal there are no issues. This is all  
18 about ensuring that when we impanel a jury Mr. Nauta doesn't  
19 stand up and say, wait a second, how did we get here? My  
20 lawyer cannot give opening statements?

21 *THE COURT:* The focus so far of this hearing does seem  
22 to be more about discussing limitations on your ability as  
23 counsel versus adequately advising Mr. Nauta.

24 In any case, I think it has become clear that, given  
25 the Government's last-minute introduction of an issue that was

1 not briefed, without binding authority, that we cannot proceed  
2 with the Garcia Hearing as to Mr. Nauta. So, regrettably, we  
3 will have to postpone this. Stay tuned for future orders  
4 related to scheduling of any such hearing. I may also require  
5 briefing to further clarify these issues.

6 I do want to admonish the Government for, frankly,  
7 wasting the Court's time because, had you brought up these  
8 issues in an appropriate way, we could have done this without  
9 circling the wagons and creating confusion that was  
10 unnecessary. So, I am disappointed in that.

11 In any case, we will proceed. There is also the  
12 matter of scheduling and the pending motion there. I will set  
13 a hearing for that purpose.

14 Thank you. The Court is in recess.

15 (Thereupon, the hearing concluded.)

16 \* \* \*

17 I certify that the foregoing is a correct transcript  
18 from the record of proceedings in the above matter.

19  
20 Date:

21 /s/ Pauline A. Stipes, Official Federal  
22 Reporter  
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Pauline A. Stipes, Official Federal Reporter

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